The Singapore Silver Bullet

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Daniel Sarmiento Mi 17 Mai 2017

According to the Daily Telegraph, “Brexit has received a significant boost” after a “landmark ruling” of the European Court of Justice on the EU-Singapore trade agreement. The Times of London stated yesterday that the Court’s ruling “smooths the way for a Brexit trade deal without veto”. The Guardian declared that the Luxembourg judgment “raised a ray of hope for British trade negotiators”.

Such good news for Brexit and its ardent brexiteers!

However, I must admit that after reading the Court’s Opinion my feeling is exactly the opposite. The Court has made a clever juggling exercise with Christmas presents for everybody. But in fact, the Court has saved the best Christmas present for itself. And there are hardly any gifts for Britain.

The Singapore Opinion is a marvelous gift for the EU because it paves the way for smooth ratification processes for the latest generation of trade agreements, so-called megatrade agreements. This makes life certainly much easier for the Commission and, in the end, for the EU altogether. The growing tendency to make use of mixed agreements with a tedious and politicized national ratification process (in which anything, except the genuine trade issues, was used to torpedo very reasonable agreements) has been put partly to a halt, and for all the good reasons.

The Opinion is also good news for Member States, for it nevertheless admits that portfolio investment is still a matter of Member State competence, shared with the EU. Member States have not been deprived of all role and purpose in trade policy, particularly in a sensitive area such as portfolio investment that can eventually involve foreign investment in strategic resources of a Member State.

But above all, the Opinion is wonderful news for the Court of Justice itself. The Court has never been a big fan of other international courts meddling in the interpretation of EU Law. It has not been a supporter of arbitration either. It is therefore no surprise that investment arbitration has been received with some hostility from EU Law, first by the European Commission, and now, since yesterday, by the Court. In a very clever way, the Singapore Opinion paves the way to the extinction of EU investment arbitration, at least in megatrade agreements to which the EU is a party. The court does not state that investment arbitration is contrary to EU Law, it simply says that this is a shared competence and therefore needs Member State ratification. In a masterclass of judicial diplomacy, the Court has made it very easy for the parties of a megatrade agreement to renounce to investment arbitration as a means of dispute settlement. If the price of introducing investment arbitration is to risk the derailment of the megatrade treaty in a national or regional parliament after so many years of touchy negotiations, it is reasonable to assume that the EU’s counterparty will live happily without these contentious tribunals. Therefore, the Court is actively contributing in putting to rest arbitration tribunals in EU megatrade agreements.

And who is the big loser of the Singapore Opinion? Besides the arbitration community, the other victim of the Court’s ruling is the UK and its blue, red and white Brexit. In paragraph 300, the Court makes an ominous assertion that should be taken closely into account by the UK negotiators. The Court states that a dispute settlement regime between States is part of the ordinary institutional framework of the trade agreement and it is thus an exclusive competence of the EU. However, the Court adds,

> *“the present procedure does not relate to the question whether the provisions of the envisaged agreement are compatible with EU Law”.*

And the Court carries on reminding the reader that the Opinion only concerns the issue of EU competence, but not whether the dispute settlement agreement in the Singapore agreement "fulfills the criteria set out by […] other opinions, in particular the criterion relating to the autonomy of EU Law".

It was inevitable. Sooner or later it had to come up.

Of course, it's the autonomy at last!

For those who have been following the Brexit saga, paragraph 301 of the Singapore agreement will probably ring a bell. It certainly did it for me. The European Council Guidelines on the Brexit negotiation are quite clear in this regard:

> *"17. The withdrawal agreement should include appropriate dispute settlement and enforcement mechanisms regarding the application and interpretation of the withdrawal agreement, as well as duly circumscribed institutional arrangements allowing for the adoption of measures necessary to deal with situations not foreseen in the withdrawal agreement. This should be done bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union."*

And later on, when referring to the future trade agreement, the Guidelines declare:

> *"23. The future partnership must include appropriate enforcement and dispute settlement mechanisms that do not affect the Union's autonomy, in particular its decision-making procedures."*

In other words, the UK should start assuming that it will have to accept the jurisdiction of the Court of Justice one way or the other, or it will otherwise undermine the autonomy of the Union legal order. The Guidelines were an *apéritif* in this regard. The Singapore Opinion, in paragraph 301, is the confirmation that the European Council was not bluffing on this. The Court is not bluffing either.

The withdrawal agreement will need to be subject to dispute settlement mechanisms that do not interfere with the autonomy of Union law. The future trade agreement will be subject to similar mechanisms too. But if the reader takes a look back and follows the Court's track record when scrutinizing the compatibility of international dispute settlement systems subject to EU Law, he or she will quickly notice that the Court has been very careful to protect its own jurisdiction from any suspicious intrusion.

In fact, the withdrawal agreement will be an act of primary law (*materially* primary law, as the ECHR accession treaty or the Electoral Act) and it is to be expected, for the sake of autonomy, that the Court will preclude any other jurisdiction from interpreting key rules of the Union legal order. The future trade agreement with the UK will be even more complex than the current megatrade agreements, and the Court is not going to let an arbitration tribunal or anything of the kind come close to it. Yesterday's Opinion is the confirmation of how ferocious the Court will be if the EU negotiators give away, even in the slightest portion, the jurisdiction of the Luxembourg Court.

So indeed, the Singapore Opinion is good news. Good news for trade. Good news for the EU, good news for Member States and, above all, wonderful news for the Court of Justice, once again in full control of process, in perfect timing and immaculate tone.

And while the brexiteers cheered the Court for paving the way for a wonderful Brexit, nobody seemed to notice paragraph 301 of the Opinion, a camouflaged silver bullet, quietly waiting for it to be used in a near future, to blow up

the entire Brexit process in the name of the autonomy of EU Law.

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